

STATEMENT OF THE CASE

Defendant-Appellant Marcus T. Govan (“Govan”) appeals from his conviction after a bench trial of the offenses of battery, a Class C felony, Ind. Code §35-42-2-1(a)(3); and criminal recklessness, a Class C felony, Ind. Code §35-42-2-2(d)(1) and (2). We affirm in part, and reverse and remand in part.

ISSUES

Govan raises the following restated issues for our review:

- I. Whether there is sufficient evidence in the record to sustain Govan’s convictions for Class C felony battery and Class C felony criminal recklessness; and
- II. Whether double jeopardy prevents Govan from receiving convictions for both offenses in this case.

FACTS AND PROCEDURAL HISTORY

The facts adduced at trial established that Govan and Alton Jackson (“Jackson”) had known each other for several years. In January of 2006, Jackson had his girlfriend drive him to Govan’s home where Jackson purchased illegal drugs from Govan. Jackson did not pay Govan for the drugs and drove away from Govan’s home. The following day, Jackson felt guilty about failing to pay for the drugs. Jackson contacted Govan, apologized, and told Govan that he would pay for the drugs. Govan told Jackson that he had no problem with Jackson paying him back later.

On January 14, 2006, Jackson contacted Govan about purchasing some more illegal drugs. Jackson and Govan agreed upon a time and a place for the transaction.

Early on the morning of January 15, 2006, Jackson drove to the location where he was to meet Govan. Prior to meeting with Govan, Jackson ingested crack cocaine, marijuana, and alcohol.

Jackson waited in his car for a few minutes after arriving at the agreed upon location before Govan arrived. Govan parked his car behind Jackson's car, exited the car, and told Jackson to wait while Govan entered a nearby residence. When Govan left the residence he entered the front passenger seat of Jackson's car. Govan pulled out a semi-automatic handgun, pointed it at Jackson, and ordered Jackson to give him all of his money. Govan told Jackson that he was not "playing." Jackson gave Govan his money. Nonetheless, Govan cocked the gun, pointed it at Jackson's abdomen, and fired. Jackson, who was in excruciating pain, attempted to gain control of Govan's gun, but was unable to do so.

As Govan attempted to exit the car, Jackson put the car in gear and started to drive away. Govan pointed the gun at Jackson and ordered him to stop. Jackson unsuccessfully reached for the gun again as Govan attempted to exit the car. When Govan was partially out of the car, Jackson accelerated and Govan fell out of the car. Govan fired several shots at Jackson's car as Jackson fled. Govan's shots left bullet holes in the back of Jackson's car.

Jackson drove himself to St. Joseph Hospital where he was transferred to Parkview Hospital. There, Jackson underwent several surgeries to treat his injuries. Jackson continues to have health problems, and is unable to return to work, as a result of the gunshot wound inflicted upon him by Govan. On several occasions Ft. Wayne Police

Detective Bridget Glaser attempted to question Jackson at the hospital about the shooting, but Jackson was sedated and unable to remember details about the shooting then. Ultimately, Jackson was able to identify Govan as the person who shot him.

Detective Glaser spoke with Govan about the shooting. However, Govan denied any involvement in the shooting, denied selling any drugs to Jackson, and claimed that he had known Jackson for a short time. Govan's girlfriend told Detective Glaser that Govan was with her during the time the shooting occurred. However, she could not specifically recall the night in question. She stated that when she and Govan were involved in a relationship, Govan was always with her.

The State filed the instant charges against Govan on March 31, 2006. Govan waived his right to a jury trial, and was tried to the bench on June 28, 2006. The trial judge found Govan guilty on both counts. The trial judge sentenced Govan to two concurrent terms of eight years' imprisonment for the offenses. Govan now pursues this appeal of his convictions.

DISCUSSION AND DECISION

I. SUFFICIENCY OF THE EVIDENCE

Our standard of review in sufficiency cases is well established. In considering such a claim, this court considers only the probative evidence and reasonable inferences supporting the judgment, without weighing the evidence or judging witness credibility, and determines therefrom whether a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Richards v. State*, 816 N.E.2d 72, 74 (Ind. Ct. App. 2004). If there is substantial evidence of probative value supporting the verdict,

we will affirm. *Id.* Moreover, it is for the trier of fact to reject a Defendant's version of what happened, to determine all inferences arising from the evidence, and to decide which witnesses to believe. *Holeton v. State*, 853 N.E.2d 539, 541 (Ind. Ct. App. 2006).

Govan challenges the sufficiency of the evidence identifying him as the shooter. Govan's argument is that Jackson's testimony is not credible because Jackson admittedly was under the influence of alcohol, marijuana, and crack cocaine at the time he was shot. Govan further argues that he had a valid alibi for the time of the shooting.

Jackson testified unequivocally that Govan was the person who shot him. Jackson admitted that he had very little recollection of what he had told police while he was at the hospital because he was sedated for a long time due to the severity of his injuries. Jackson admitted that he was under the influence of alcohol, marijuana, and crack cocaine at the time of the shooting. Even so, Jackson was able to drive himself to the hospital after the shooting for treatment of his injuries. Further, the testimony established that Govan had a motive for shooting Jackson. Jackson owed Govan some money for a previous drug purchase.

Govan presented his alibi evidence to the trial court through his girlfriend's testimony. However, Govan's girlfriend testified that she could not recall with specificity or certainty that Govan was with her at her home the entire night of the shooting.

Govan's argument challenging the sufficiency of the evidence appears to be an invitation to reweigh the evidence. Our review of the record leads us to the conclusion that there is sufficient evidence of Govan's identity to support the trial court's determination of Govan's guilt.

II. DOUBLE JEOPARDY

Article I, Section 14 of the Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." In *Richardson v. State*, 717 N.E.2d 32, 43-44 (Ind.1999), our supreme court held that two or more offenses are the "same offense" in violation of Article I, Section 14, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. A defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense. *Id.* at 553.

The charging information alleging that Govan committed the offense of Class C felony criminal recklessness reads in relevant part as follows:

On or about the 15th day of January, 2006, . . .said Defendant, Marcus T. Govan, did by means of a deadly weapon, to wit: a firearm, recklessly, knowingly, or intentionally inflict serious bodily injury on Alton Jackson, to wit: extreme pain and/or substantial risk of death, by discharging said firearm at and/or in the direction of said Alton Jackson. . .

Appellant's App. p. 10. The charging information alleging that Govan committed the offense of Class C felony battery reads in relevant part as follows:

On or about the 15th day of January 2006, . . .said Defendant, Marcus T. Govan, did by means of a deadly weapon, to wit: a firearm, knowingly or intentionally touch[sic] another person, to wit: Alton Jackson in a rude, insolent, or angry manner. . . .

Appellant's App. p. 9.

Here, Govan argues that the convictions for Class C felony battery and Class C felony criminal recklessness are the same offense under the actual evidence analysis, thereby violating the double jeopardy clause. Govan concedes that, as charged, there is one element of the criminal recklessness charge, serious bodily injury, which differs from the battery charge.

In order to establish Govan's guilt of the offense of Class C felony battery, the State was required to show that Govan knowingly or intentionally touched Jackson in a rude, insolent or angry manner by means of a deadly weapon. The State argued below and now here on appeal that the battery occurred when Govan entered Jackson's vehicle and shot Jackson in the abdomen with a firearm.

In order to establish Govan's guilt of the offense of Class C felony criminal recklessness, the State was required to show that Govan recklessly, knowingly, or intentionally by means of a deadly weapon, inflicted serious bodily injury by discharging the firearm at, or in the direction of, Jackson. The State argues here that the act of criminal recklessness occurred as Govan fell from Jackson's vehicle. Govan continued to discharge his firearm in the direction of Jackson's vehicle as Jackson sped away. However, Jackson testified that he did not receive additional injuries from Govan's gunfire as Jackson sped away. Therefore, the same act—Govan pointing a firearm at Jackson and firing it, causing an abdominal wound to the victim— was used to establish the touching element of battery and the infliction of serious bodily injury element of criminal recklessness. Therefore, Govan has demonstrated a reasonable possibility that

the same evidentiary facts were used to establish the essential elements of the offenses as charged.

Our supreme court has stated that the appropriate remedy, once a contravention of state double jeopardy protections has been found, is to reduce either conviction to a less serious form of the same offense if doing so will eliminate the violation. *See Adams v. State*, 754 N.E.2d 1033, 1037 (Ind. Ct. App. 2001) quoting *Richardson*, 717 N.E.2d at 54. If the violation cannot be cured by reducing the offense, then the conviction with the less severe penal consequences must be vacated. *Id.*

In the present case, the facts support reducing Govan's criminal recklessness conviction to a Class D felony. Ind. Code §35-42-2-2(c)(2)(A) provides that a person who recklessly, knowingly, or intentionally performs an act that creates a substantial risk of bodily injury to another person and that act is committed while armed with a deadly weapon, has committed Class D felony criminal recklessness. Here, Govan fired several shots from his firearm at Jackson's car as an already wounded Jackson attempted to flee the scene. Several photos of Jackson's bullet-riddled car were admitted at trial. Govan's actions during and after he fell out of Jackson's car constitute a separate offense, Class D felony criminal recklessness.

Therefore, having found the double jeopardy violation, and having found a remedy for the violation, we remand this matter to the trial court for proceeding consistent with this opinion. The criminal recklessness conviction should be reduced to a Class D felony, and the sentence, albeit concurrent, should be corrected to reflect this change.

CONCLUSION

The evidence is sufficient to support Govan's convictions of battery and criminal recklessness. There is sufficient evidence of Govan's identity to uphold the convictions. Further, although we find that there is a state double jeopardy violation, that violation can be remedied by reducing the Class C felony criminal recklessness conviction to a Class D felony criminal recklessness conviction.

Affirmed in part, reversed and remanded in part.

FRIEDLANDER, J., and RILEY, J., concur.